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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1654

CONNIE HARDEE BRANCH,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent respectfully prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of a decision of the Supreme Court of the State of North Carolina entered on December 17, 1975, be denied.

CITATION TO OPINION BELOW

The petitioner was tried and convicted of conspiracy to murder and accessory before the fact to murder, in the Superior Court of Pitt County. Sentences of life imprisonment and ten years imprisonment were adjudged to be served concurrently. The Supreme Court of North Carolina affirmed the judgment. 288 NC 514.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code,

Section 1257(3). The opinion of the Supreme Court of North Carolina was filed December 17, 1975, and an extension of time in which to file this petition was granted by the Honorable Warren E. Burger, Chief Justice of this Honorable Court on the 12th day of March, 1976, extending petitioner's time to file to and including May 15, 1976.

QUESTION PRESENTED

WHETHER A DEFENDANT'S IN-COURT IDENTIFICATION FOUND BY THE TRIAL COURT NOT TO HAVE BEEN TAINTED BY TWO IMPERMISSIBLY SUGGESTIVE PRE-TRIAL PHOTOGRAPHIC SHOW-UPS MUST BE EXCLUDED FROM EVIDENCE WHERE THE TOTALITY OF THE CIRCUMSTANCES SUPPORTS THE INDEPENDENT AND UNTAINTED NATURE OF THE IN-COURT IDENTIFICATION?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This was a criminal action in which the defendant, Connie Hardee Branch, along with her co-defendant, Roy Lee Sullivan, were indicted on charges of accessory before the fact to murder and conspiracy to commit murder. The cases were consolidated for trial over objection and were tried before the Honorable Perry Martin, Superior Court Judge, at the October 14, 1974, Criminal Term of Superior Court in Pitt County.

From a verdict of guilty of both offenses and the imposition of a sentence of life imprisonment and ten years, the defendants Sullivan and Branch appealed. A motion to bypass the North Carolina Court of Appeals was filed and granted. The Supreme Court of North Carolina heard the appeal on September 9, 1975, and affirmed the judgments below on December 17, 1975.

STATEMENT OF FACTS

The State offered the following evidence which tended to show that petitioner and her co-defendant paramour had conspired with and hired a paid killer, Matthew Jack Whealton, to murder petitioner's husband, Linwood Branch

The State's witness, Matthew Jack Whealton, stated that at the time of the events in question, he was a resident of Chesapeake, Virginia, where he was employed as a car salesman. He had known the defendant, Roy Lee Sullivan, for about six months and identified him but was unable initially to recognize Connie Hardee Branch in court though he subsequently positively identifed Mrs. Branch in court.

Whealton testified that he and Sullivan arranged to meet and met at the Piedmont Aviation Terminal in Norfolk, Virginia, in February, 1974. During their conversation, Sullivan asked Whealton about finding someone to kill Linwood Branch for four thousand dollars. Whealton said that he might be able to find such a person. Sullivan and Whealton also discussed a loan that Whealton was trying to arrange for Sullivan ostensibly to buy an airplane. In a telephone call Whealton told Sullivan that the price for the killing would be five thousand dollars ($5,000.00).

At a meeting in the parking lot of the Fass Seafood Restaurant in Washington, North Carolina, Whealton met a

woman who introduced herself as Connie Branch and who he subsequently identified in court as Connie Branch. She gave him some pictures of Linwood Branch, a description of the car Mr. Branch drove and offered him a five thousand dollar ($5,000.00) check which Whealton refused saying he wanted cash. After some detailed discussion with Mrs. Branch, Whealton was also joined by Sullivan.

In mid-March, Whealton and Sullivan met again and Sullivan gave Whealton five thousand dollars ($5,000.00). When Whealton returned to Virginia, he called Harold Wiseman and bought two handguns, one a .38 caliber and the other a .32 caliber automatic which he gave to Wiseman along with twenty-five hundred dollars ($2,500.00).

Subsequently, Whealton received numerous phone calls from Sullivan asking about progress and on March 19, 1974, Whealton and Wiseman came to North Carolina to kill Branch. On that trip, Sullivan told Whealton that he wanted Branch's death to look like a robbery and suggested that it be done at the Branch home by the carport. That evening, Whealton and Wiseman went in search of Mr. Branch but did nothing. On March 21st, they returned again to North Carolina but they got drunk and again did nothing and returned to Virginia.

Numerous telephone calls were made by Sullivan to Whealton. On March 23rd, Whealton talked with Sullivan and Mrs. Branch by telephone and they inquired when he would come back to kill Mr. Branch. On March 29th, Whealton and Wiseman returned to North Carolina and talked to Sullivan who said Mr. Branch had a different kind of car. Whealton drove Wiseman to the Branch house and let him out and proceeded around the block. A little later he met Wiseman walking away from the Branch house and picked him up and then saw Mr. Branch go past them in a car.

They went back to the Branch house, Whealton called to Mr. Branch and Branch walked towards him. While Branch was walking towards him and was about fifteen feet away, Whealton fired at him from his position in the car. At first, Branch did nothing, then he walked a few steps closer, stumbled and fell against the car.

Whealton drove away and went back to Virginia and threw the gun into the Albemarle Sound. Sullivan called Whealton the next day to say Branch had not died and then called later to say that he had.

A voir dire inquiry was conducted concerning the identification of Mrs. Branch. The trial court found as a fact that Whealton had recognized Mrs. Branch before the lunch break and before being shown any photographs and that the "in-court identification of Mrs. Branch was in no way connected with photographs or anything anyone said to him during the lunch hour." The trial court concluded as a matter of law that the in-court identification of Mrs. Branch by Whealton was "not in any way tainted or influenced by the statements or observations made to the witness by the officers or the District Attorney, if any, in fact, were made." and that the in-court identification was based upon the clear observation by Whealton of the face and person of the defendant when he had an opportunity to have a clear unobstructed profile view of her during the morning recess under well lighted conditions and after a sufficient period of observation to form an opinion as to her identification.

On redirect examination Whealton identified Connie Branch in the courtroom and explained that he had not recognized her when first asked because of changes in her appearance since he had seen her at Fass Seafood Restaurant. She had changed her hair color, her hair style, and was wearing glasses in court. He further testified that the prosecution had said that in return for his testimony, they would not seek the death penalty but rather life imprisonment for his part in the death of Linwood Branch.

On cross examination, Whealton said that he was not certain that he had shot Branch but only that he had aimed at someone he thought was Branch, who was walking towards him, and had fired at him.

Robert Cochran testified that he sold Whealton a .32 caliber handgun in March, 1974.

Dr. Robert Lee West testified as an expert in pathology that Linwood Branch was killed by damage to the brain caused by a wound which went from the right of center in the back of the head and proceeded in a straight line to the exit point through the right eye. The wound was consistent with one caused by a pistol bullet.

Dr. Ira M. Hardy testified as an expert in neurosurgery and said that in his opinion, Linwood Branch died of brain contusions. He testified further that he saw Mrs. Branch while he was treating her husband that she was very upset when told of her husband's death.

Gloria Allsbrook testified that she had been intimate with Whealton and had accompanied Whealton to North Carolina from Virginia on three occasions including March 29, 1974, and that each time they stayed at the Lemon Tree Inn in Chocowinity. On one trip she made a phone call from the Lemon Tree Inn for Whealton to Roy. A lady answered and Mrs. Allsbrook asked for Roy.

D. R. Daniels testified that he works with the Greenville Rescue Squad and that he received a call from Mrs. Branch on March 29, 1974, to come get her husband and that he observed Mrs. Branch and that she seemed very upset and was crying. Her emotion appeared real. He recognized her voice on the telephone based on knowing her for several years.

Ralph Taylor testified that he was the manager of a loan company, had loaned Roy Lee Sullivan and his parents about $6,500.00 in March, 1974, which Roy Sullivan told Taylor he planned to use to buy an airplane and that Roy Lee Sullivan lived with his parents on March 11, 1974, and their phone number was 527-0648.

Jane Jones testified that she worked for the same loan company as Ralph Taylor, knew about the loan and that Sullivan had said the purpose of the loan was to buy a plane but she had been told by Sullivan several days after March 11th that he had not bought an airplane.

Essie Haddock testified that she worked for Branch Bank and Trust Company and that she knew Sullivan and had cashed the $6,500.00 loan company check on March 12th for him for cash from which he made a deposit for $1,025.00.

Joseph White testified that he worked for Chesapeake and Potomac Telephone Company as a commercial representative and testified about various telephone calls between telephone number (804) 420-7451 at Cline Chevrolet on Military Highway in Norfolk, Virginia, and (804) 622-1811 at Cline Chevrolet at 13th and Monticello Avenue, and 527-0648 in Kinston, North Carolina, on State's Exhibit #3 on March 8 and 9, 1974.

Moodie Ward testified that he worked for Carolina Telephone Company and testified about telephone calls on State's Exhibit #4 which was the phone bill for the residence of Roy Sullivan and his parents. He also testified about a variety of calls made between telephones to which Roy Sullivan and Connie Branch had regular access. He further testified in reference to State's Exhibits 5, 6, 7 and 8 reflecting that Connie Branch received the telephone bill for Better Homes and Realty Co. whose number was 752-6457 reflecting a large number of calls between the L. N. Branch residence in Greenville (758-3677) and 527-0648, the residence of Roy Sullivan in Kinston, reflecting a 21 minute conversation on March 29th at 6:29 p.m. between 758-2605 in Greenville and 527-0648 in Kinston, reflecting 3 calls on March 19, 1974, from 946-8001 assigned to the Lemon Tree Inn to 527-0648 in Kinston.

Bonnie Daniels testified that she worked at the Lemon Tree Inn in Chocowinity and that she had registration cards for M. J. Whealton for March 19, 21, and 29, 1974, and records of long distance calls made by Whealton to (919) 527-0648.

Susan Bishop testified that she was a mobile telephone operator and that she knew Sullivan and had seen him with Connie Branch, and that one night in March, 1974, Sullivan had showed her wedding rings and had said in Mrs. Branch's presence that he was going to marry Mrs. Connie Branch. She

also testified she had heard Sullivan talk to Mrs. Branch on his car telephone approximately 15 to 20 times in January, February and March, 1974.

Hodges Davenport testified that he ran the Kinston Stockyard Auction Market and had seen Sullivan and Mrs. Branch alone together at the Stockyard for about 30 minutes on March 24, 1974.

W. C. Meekins testified that he worked for Norfolk and Carolina Telephone Company and testified about M. J. Whealton's telephone records which were identified as State's Exhibits 11 and 12 and about a pay telephone record for a pay telephone at Earl's Market in Great Bridge, Virginia, identified as State's Exhibit #13 identifying numbers called in Kinston (919) 527-0648.

Geno P. Lucarelli testified that his principal business was flying and that he lived in Monck's Corner, South Carolina. He testified that he knew Sullivan and had talked with him on the telephone 10 or 12 times between January and March, 1974, and that Sullivan said his girl friend was having trouble with her husband and that Sullivan had inquired about whether Lucarelli knew someone who might kill him for money, that money was no object.

Ronald F. Bennett testified that he and Sullivan were partners in an agricultural spraying business for some time and that Sullivan had called him in latter part of February, 1974, and asked if he knew who could kill somebody for him. Bennett testified that Sullivan called again in April and asked him to call Jack Whealton to find out "whether the heat was on him or not"Bennett said that he contacted the South Carolina Law Enforcement Division and thereafter called Sullivan again and that Sullivan told him that Whealton had killed L. N. Branch for $5,000.00 and that during the conversation a Lt. Wrenn listened on his phone and taped the conversation. Bennett testified that Sullivan told him on about the 19th of April he (Sullivan) was in love with Connie Branch and that they were going to be married as soon as possible.

Dalton Respass testified that he was a deputy sheriff and that he knew Connie Branch, knew she operated the Better Homes and Realty Co., and that her appearance had changed between the winter and spring of 1974 because the color and style of her hair had been changed as illustrated by a photograph of Mrs. Branch in early 1974.

At the conclusion of the testimony of Moodie Ward regarding telephone call records, the State rested its case. There was no evidence for the defendants Defendants moved for nonsuit, for dismissal of charges, for directed verdict of not guilty and for mistrial, all of which were denied

ARGUMENT

WHETHER A DEFENDANT'S IN-COURT IDENTIFICATION FOUND BY THE TRIAL COURT NOT TO HAVE BEEN TAINTED BY TWO IMPERMISSIBLY SUGGESTIVE PRE-TRIAL PHOTOGRAPHIC SHOW-UPS MUST BE EXCLUDED FROM EVIDENCE WHERE THE TOTALITY OF THE CIRCUMSTANCES SUPPORTS THE INDEPENDENT AND UNTAINTED NATURE OF THE IN-COURT IDENTIFICATION?

Petitioner Branch argued in the Supreme Court of North Carolina that the in-court identification of Mrs. Connie Branch by the witness Whealton was the result of and was impermissibly influenced by the showing of photographs of Mrs. Branch as she appeared in March, 1974, to Whealton during the lunch hour. The trial court found facts to the contrary and the Supreme Court of North Carolina likewise refused to accept petitioner's argument.

There is testimony under oath that the petitioner had changed her physical appearance since March, 1974, that the identifying witness Whealton's view of her was somewhat obstructed by the large number of attorneys around her standing to make repeated objections; and that the witness Whealton recognized Mrs. Branch when she turned her head

in a certain way during the morning break at about 11:00 a.m., before the luncheon recess and *not* based on any photographs shown to the witness at the luncheon recess.

The trial court conducted a *voir dire* to determine whether there was any taint to the in-court identification resulting from the lunchtime showing of Mrs. Branch's photograph (as she appeared in March, 1974,) to the witness Whealton.

After hearing evidence out of the jury's presence, the trial court found certain facts as follows:

> "1. That the witness Mr. Whealton has testified upon examination by Mr. Williamson that he first told officers during the lunch hour that he could at that time identify the defendant, Mrs. Branch.
>
> 2. That the witness Mr. Whealton has testified further that he first recognized Mrs. Branch this morning during the morning break at or about 11:00 a.m. when she (Mrs. Branch) turned to her side so that he could get a profile–strike from so–whereupon he got a profile view of the side of her face; that this recognition of Mrs. Branch at or about 11:00 a.m. this morning, or during the morning break was *before any officer or attorney or anybody had talked to him about the identification or about his testimony with respect to identification of Mrs. Branch.*
>
> 3. That the officers did show him photographs of Mrs. Branch in an elevator during the lunch hour, and that he did talk to the district attorney during the lunch hour, and that, however, the witness has testified that *his in-court identification of Mrs. Branch is in no way connected with photographs or anything that anyone said to him during the lunch hour.*

> 4. That he told the officers during the lunch hour that he had recognized Mrs. Branch during the morning break *before they showed him any photographs or talked to him about the matter." Emphasis added.*

The trial court entered certain conclusions of law:

> "(A)s a matter of law that the in-court identification of the defendant Mrs Branch by the prosecuting witness was based upon the clear observation–strike the word 'prosecuting witness' and use 'witness'–was based upon the clear observation by the witness Whealton of the face and person of the defendant when he had an opportunity to have a clear, unobstructed profile view of her during the lunch hour–during the recess this a.m. under well-lighted conditions and after a sufficient period of observation to form an opinion as to her identification; and that the in-court identification of this defendant was not in any way tainted or influenced by the statements or observations made to the witness during the lunch hour by the officers or the district attorney, if any, in fact, were made."

North Carolina's Supreme Court has observed that:

> "It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. *Wong Sun v. United States*, 371 US 471, 9 L. Ed. 2d 441, 83 S. Ct. 407." *State v. Henderson*, 285 NC 1, 12, 203 SE 2d 10 (1974).

Likewise, when facts are found by the trial court and the facts so found are supported by competent evidence, they should be conclusive on appellate courts. *State v. Henderson*, 285 NC at 14.

The Supreme Court of North Carolina has defined the due process test as follows:

> "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California*, 394 U.S. 440, 22 L. Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205." *State v. Henderson*, 285 NC 9 (1974).

Quoting with approval from *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, noted that:

> "(W)e hold that each case must be considered *on its own facts*, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was *so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification...*". *Emphasis added.*

The North Carolina Supreme Court has said that it will not bar an in-court identification unless a pretrial identification was "fundamentally unfair" and that "(T)he totality of the circumstances surrounding the prior identification will determine its admissibility at the trial". *State v. Banner*, 279 NC 595, 598 (1971).

As pointed out in *Neil v. Biggers*, 409 US at 198, "...the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification' *Simmons v. U. S.*, 390 US at 384. ...It is the likelihood of misidentification which violates a

defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*." (*Foster v. California*, 394 US 440 (1969))

Foster is readily distinguishable from the case at bar in that it involved two suggestive show-ups, at the first of which the witness could not identify the defendant. Here the identification of the petitioner Branch was found as a fact by the trial court and all evidence supports the finding that it was made before the second showing of photographs. Likewise, all photographs shown were of the Petitioner as she appeared near the time of the crime, not in her disguised and changed appearance at trial.

Even after having been shown photographs 10 days or two weeks earlier, Whealton was unwilling to identify petitioner in court under oath until he had observed her from the profile view unobstructed by attorneys and could be sure of his identification.

His basis for his in-court identification was the extended conversation with her in the Fass Restaurant parking lot where she identified herself as "I am Connie Branch" and then proceeded at length to discuss in detail her hiring of Whealton to commit the murder of her husband. In this discussion, the time was mid-afternoon in March–clearly daylight–at a distance of no more than an automobile seat, face to face, with ample opportunity for Whealton to study her expressions, reactions and show of emotions as he questioned her to determine whether he could safely contract with this woman, the Petitioner, to kill her husband. Clearly he was not a "casual observer". More importantly, he was not a frightened or hysterical would-be victim but was a calculating killer-for-hire who was making what he must have conceived to be a life or death business decision.

In *State v. Knight*, 282 NC 220, 225, 192 SE2d 283 (1972), the Supreme Court of North Carolina set out the factors to be evaluated in considering the *Simmons* "totality of the circumstances" test as follows:

> "'(1) The manner in which the pretrial identification was conducted; (2) the witness's

prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and out-of-court identification.' *United States v. Zeiler*, 447 F2d 993 (3d Cir. 1971). Cf. *United States v. Wade*, 388 US 218, 18 L Ed 2d 1149, 87 SCt 1926 (1967)." *State v. Knight*, 282 NC 220, 225 (1972).

In *Neil v. Biggers*, 409 US at 199, the Supreme Court listed some of the factors which should be evaluated in considering the totality of the circumstances:

"The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

In the instant case each of the factors mentioned in *State v. Knight* and in *Neil v. Biggers* is relevant in support of the State's contention that from the totality of the circumstances there was no impermissible taint of the in-court identification.

THE *SIMMONS V. UNITED STATES* TEST

Addressing the *Simmons* factors, as to the manner in which the impermissible photographic confrontation was conducted, witness Whealton was shown photographs of the Petitioner, Mrs. Branch, AS SHE HAD APPEARED IN

MARCH, 1974, the time of witness Whealton's having seen her. There is evidence that since March, 1974, Petitioner Branch's hair STYLE and COLOR had been substantially changed and that in court she was wearing eyeglasses though contrary to her previous custom.

As to Whealton's opportunity to observe Mrs. Branch, he had an extended occasion in Washington, North Carolina, first alone with her in his car after she introduced herself and later in the company of Mr. Sullivan. That opportunity occurred in mid-afternoon around March 1, 1974, when Mrs. Branch met Whealton pursuant to his agreement with Sullivan in Fass Seafood Restaurant parking lot. Mrs. Branch approached Whealton after she got out of a car known by Whealton to be the same kind of car Mrs. Branch drove (Rp. 53). Mrs. Branch called Whealton by his middle name, "Jack", got into the car in the front seat beside Whealton and introduced herself: "I am Connie Branch".

In the extended conversation in Whealton's car, Whealton asked and Mrs. Branch explained in detail why she wanted her husband killed. In answer to Whealton, she said she would have no regrets if someone else were caught, tried and convicted of her husband's murder. Mr. Sullivan arrived and Mrs. Branch and Mr. Sullivan kissed and Sullivan joined the conversation from the rear seat of Whealton's car. (Mrs. Branch got back in the car in the front seat.) Whealton recounted the conversation with Mrs. Branch for Sullivan and the three then discussed money, Sullivan at one point offering a check. The three discussed the murder method to be used and the advantages of making the murder look like there had been a robbery. Mrs. Branch then furnished Whealton photographs of the victim, her husband. Mrs. Branch offered her car as part payment. This lengthy conversation gave Whealton an extended opportunity to study and observe Mrs. Branch and her reactions at close range (on the car's front seat) in broad daylight while they discussed when and how Whealton should kill her husband.

There is no evidence anywhere in the record which would show any description of Mrs. Branch at variance with her actual appearance IN MARCH, 1974. Whealton described her to

officer Respass in March, 1974, as being about 5'6" tall, weighting 115 lbs. and having a fair complexion and light brown hair. Her hair was described as darker in court and she wore glasses in court whereas in March, 1974, her hair was lighter and she wore no glasses. Witness Dalton Respass confirmed that her appearance was altered since March, 1974, because of changes in hair color, hair style and glasses.

There is no evidence that Whealton had ever identified any other person other than Petitioner as Mrs. Connie Branch, the woman he met in Fass Restaurant's parking lot. Contrary to petitioner's assertion that this factor was inapplicable, Respondent urges that the absence of a wrong identification and the absence of a prior identification of Mrs. Branch adds to the strength and the untainted nature of the identification by Whealton in Court.

There is some evidence that Whealton had previously recognized Mrs. Branch from photographs of her as she had appeared in March, 1974, though there is no evidence of his ever having identified her in person until the trial date when he recognized her during the morning recess.

Petitioner makes much of the witness's failure to recognize and identify the petitioner Mrs. Branch on two occasions in the courtroom. Respondent contends that his refusal to merely point to the lone woman seated among male lawyers at the defense table was a strong factor bearing on his veracity and conscientious behavior as a truthful witness. The factors surrounding his failure to recognize a woman surrounded by lawyers who stood to object literally hundreds of times during his testimony is reasonable, especially when there is evidence to show that she had changed her hair color, her hair style and had worn glasses in court (when witness Repass testified he had never seen her wear glasses before).

It is important to note that from the time he recognized Mrs. Branch at the morning recess until on re-direct when he identified her, he was without interruption (except for the lunch recess) undergoing intensive examination and could not volunteer an identification of petitioner Branch unless responsive to questions of counsel.

The lapse of time between the meeting in March, 1974, and the showing of photographs in October, 1974, does not add materially since there was no event in which her identity was in question in that interim. It is significant that there is evidence to the effect that Whealton had recognized Mrs. Branch in the morning BEFORE being shown the photographs at lunch.

THE *NEIL V. BIGGERS* TEST

With a comparative eye to the criteria set out in *Neil v. Biggers*, 409 US at 196, Whealton also spent a considerable period of time with Petitioner Branch involved in an extended conversation; he was with her at arm's length literally in the front seat of his automobile in broad daylight during the mid-afternoon; they talked about the murder she wanted him to commit; while there was no sexual relationship as in *Biggers*, Whealton's attention must have necessarily been devoted exclusively to petitioner's expressions and reactions to his questions and comments as he determined whether to join her conspiracy to murder her husband (a crime which Whealton then thought was mandatorily punishable by death); Whealton not only described Petitioner to Officer Respass in Virginia but had told of petitioner's self-introduction to him by name; though unable to pick petitioner out with certainty in-court before seeing petitioner from a profile view during the morning recess, Whealton was certain and unequivocal in his in-court identification after having seen her at the morning recess.

Like rape, conspiracy is a crime to which there are rarely witnesses other than the perpetrators and perhaps the victim. Just as in *Biggers*, there is a seven month delay from the moment of the initial face-to-face meeting between the conspirators until trial.

Contrary to *Biggers* and most identification cases, there was no hint before trial that there was an identification proof problem in the case–Petitioner Branch had introduced herself to Whealton, she was romantically associated and regularly observed with Sullivan by numerous other witnesses, she greeted Sullivan in the Fass Restaurant parking lot with a kiss,

and there was evidence of long distance telephone calls between their numbers over a hundred times from January to March, 1974.

In fact, there is evidence upon which to conclude that except for the disguise efforts of petitioner on the day of trial there would have been no identification difficulty. When a woman defendant changes her hair style, her hair coloring and begins to wear eyeglasses, Respondent urges that there is a reasonable basis for some hesitation on the part of an identification witness who is under oath and who has not seen her for seven months and never before that. This hesitation, however, is not sufficient ground to base a constitutional claim of denial of due process.

Respondent contends that there was no fundamental unfairness in the identification, that there was no suggestiveness such as to give rise to a very substantial likelihood of irreparable misidentification where the totality of the circumstances is considered.

Respondent urges the sworn testimony of Whealton (unaltered by cross examination by able counsel) as to when he recognized her (after having been asked, but before lunch) and as to why he previously had difficulty recognizing her (obstructed view, different hair color and style, and glasses in court) is critical to a fair consideration of all the circumstances.

To bar this identification would in effect encourage every defendant to come to court in disguise hoping to confuse the witness for long enough, albeit a few minutes hesitation, to raise consitutional questions about the identification.

Respondent urges that the trial court's findings of fact and conclusions of law as to the independent origin and untainted nature of the identification in court are amply supported by testimony on *voir dire* and by testimony before the jury and therefore should remain undisturbed. There is clear and convincing evidence of the untainted nature of the identification.

Of additional significance is the fact that all the evidence tends to show petitioner Branch and her co-defendant Sullivan to be romantically involved, planning to be married, in close regular and frequent telephone contact, and disposed to show their mutual affection even in the Fass Restaurant parking lot when they kissed on meeting together with Whealton, though petitioner was then still married to Linwood Branch, the murder victim.

Respondent urges and contends that whether under the standards of *Neil v. Biggers*, 409 U.S. 188, which petitioner would limit to pre-*Stovall* cases or under the pre-*Biggers* standards laid down in *Simmons v. United States*, 390 U.S. 377, the in-court identification here is without taint (as found by the trial judge) and can pass constitutional muster under either due process test.

In any event, there is ample evidence from the totality of the circumstances to show that the identification of petitioner Branch was not mistaken, that it is reliable, that it was based upon the March, 1974, conversation with Whealton and that it was admissible notwithstanding the improper photographic displays.

CONCLUSION

Respondent urges that under either of the tests asserted, *Simmons v. United States* or *Neil v. Biggers*, the identification is constitutionally sound. Therefore, the petition should be denied since the question of which standards to use is not raised by the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; that I have served copies of the within RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing three copies of same in the United States Mail at Raleigh, North Carolina addressed to:

Mr. Dallas Clinton Clark, Jr.
Attorney for Petitioner
James, Hite, Cavendish & Blount
Post Office Drawer 15
Greenville, North Carolina 27834

first class postage prepaid.

This the 23rd day of August, 1976.

Sidney S. Eagles, Jr.
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent